

ARKANSAS SUPREME COURT

No. 07-32

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered February 1, 2007

HENRY TIMMONS
A/K/A HENRY CHESTER TIMMONS
Petitioner

PRO SE MOTION FOR RULE ON
CLERK [CIRCUIT COURT OF
LINCOLN COUNTY, LCV 2006-34,
HON. ROBERT H. WYATT, JR.,
JUDGE]

v.

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION
Respondent

MOTION FOR RULE ON CLERK
DENIED.

PER CURIAM

In 1984, Petitioner Henry Timmons, who is also known as Henry Chester Timmons, was found guilty by a jury of felony rape and a misdemeanor possession of a controlled substance. He was sentenced to sixty years' imprisonment for the rape charge and fined \$500 for the possession charge. Later, the trial court merged the misdemeanor conviction into the felony conviction and sentenced petitioner to sixty years' imprisonment. On appeal, this court reversed and remanded the case for a new trial. *Timmons v. State*, 286 Ark. 42, 688 S.W.2d 944 (1985). After remand, petitioner was again convicted by a jury and was sentenced to life imprisonment. This court affirmed. *Timmons v. State*, 290 Ark. 121, 717 S.W.2d 208 (1986).

Subsequently, petitioner filed in this court a petition to proceed in circuit court with a petition

for postconviction relief pursuant to Ark. R. Civ. P. 37.1.¹ The court denied the petition. *Timmons v. State*, CR 86-86 (Ark. Mar. 27, 1989) (*per curiam*). Later, petitioner filed in the trial court a petition to correct the sentence pursuant to Ark. Code Ann. §16-90-111 (Supp. 1991). The trial court denied the petition and we dismissed the appeal. *Timmons v. State*, CR 94-390 (Ark. May 31, 1994) (*per curiam*).

In 2006, petitioner filed a petition for writ of habeas corpus in the county in which he was incarcerated. The circuit court dismissed the petition without a hearing on June 12, 2006.

Now before us is petitioner's *pro se* motion for rule on clerk under Ark. Sup. Ct. R. 2-2(b). From the trial court's June 12, 2006, order, petitioner timely filed a notice of appeal on July 3, 2006. However, he did not tender the record on appeal to this court until January 9, 2007, which was not within ninety days of the date of the notice of appeal as required by Ark. R. App. P.–Civil 5(a). As petitioner did not perfect the appeal, he now seeks leave to lodge the record belatedly and proceed with an appeal of the order.

A petitioner has the right to appeal a ruling on a petition for postconviction relief. *See Scott v. State*, 281 Ark. 436, 664 S.W.2d 475 (1984) (*per curiam*). With that right, however, goes the responsibility to file a timely notice of appeal and tender the record with this court within the time

¹Prior to July 1, 1989, a petitioner whose judgment of conviction had been affirmed on appeal was required to petition this court for relief under Criminal Procedure Rule 37.1 and gain leave from this court to proceed under the rule in the circuit court before filing a petition there. Criminal Procedure Rule 37 was abolished by this court effective July 1, 1989. *In the Matter of the Abolishment of Rule 37 and the Revision of Rule 36 of the Arkansas Rules of Criminal Procedure*, 299 Ark. Appx. 573, 770 S.W.2d 148 (1989) (*per curiam*). Rule 37 was reinstated in a revised form on January 1, 1991. *In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure*, 303 Ark. Appx. 746, 797 S.W.2d 458 (1990) (*per curiam*). The revised rule does not require petitioners to gain leave of this court before proceeding in the trial court.

limits set by the rules of procedure. If a petitioner fails to tender the record in a timely fashion, the burden is on the petitioner to make a showing of good cause for the failure to comply with proper procedure. *See Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987) (*per curiam*). The fact that a petitioner is proceeding *pro se* in itself does not constitute good cause for the failure to conform to the prevailing rules of procedure. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984) (*per curiam*); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983) (*per curiam*); *see also Sullivan v. State*, 301 Ark. 352, 784 S.W.2d 155 (1990) (*per curiam*).

Here, petitioner maintains in his motion that the late tender was the fault of the Lincoln County Circuit Clerk, inasmuch as the clerk requested payment for the transcript. Petitioner maintains that as he is indigent, the clerk impermissibly denied his access to the record for appeal.

When proceeding *pro se*, this court has specifically held that it is not the responsibility of the circuit clerk, circuit court, or anyone other than the *petitioner* to perfect an appeal. *Sullivan, supra*. The record does not disclose that petitioner obtained an order to proceed *in forma pauperis* on appeal, which is distinct from an order to proceed *in forma pauperis* at the trial court level. Without a court's determination as to his indigency *on appeal*, the clerk had the right to demand payment for the record on appeal. Petitioner has stated no "good reason" for the late tender of the record.

Moreover, even if the appeal were permitted to go forward, it is apparent that appellant could not prevail on appeal. This court has consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to proceed where it is clear that the appellant could not succeed. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

The principal issue in a habeas corpus proceeding is whether the petitioner is detained

without lawful authority. Ark. Code Ann. § 16-112-103 (Repl. 2006); *Fullerton v. McCord*, 339 Ark. 45, 2 S.W.3d 775 (1999). A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacked jurisdiction over the cause. *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994).

Unless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Friend v. Norris*, 364 Ark. 315, ___ S.W.3d ___ (2005) (*per curiam*). The petitioner must plead either the facial invalidity or the lack of jurisdiction and make a “showing, by affidavit or other evidence, [of] probable cause to believe” he is illegally detained. Section 16-112-103(a)(1). *See also Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). However, a habeas corpus proceeding does not afford a prisoner an opportunity to retry his case and is not a substitute for direct appeal or a timely petition for postconviction relief. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (*per curiam*).

Here, petitioner complained in the habeas petition that he was improperly sentenced as a habitual offender as he was not convicted of a sufficient number of crimes to trigger that status. The question posed was not similar to a jurisdictional question, but required the kind of factual inquiry that would go well beyond the facial validity of the commitment. *See Friend, supra*. The allegations in appellant's petition did not raise a question of a void or illegal sentence such as may be addressed in a habeas corpus proceeding.

Motion for rule on clerk denied.